United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-6054

United States Court of Appeals
For the Second Circuit

B

P/S

GIUSEPPE CATANZARO,
Plaintiff-Appellant,

-against-

CENTRAL GULF STEAMSHIP CORP.,
Defendant and
Third Party Plaintiff-Appellee,

-against-

UNITED STATES OF AMERICA,
Third Party Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Whether the trial court's derogatory comments pertaining to appellant's expert witness deprived appellant of a fair trial?

2. Whether the trial court's refusal to permit appellant to change trial counsel was an abuse of judicial discretion?

3. Whether the continuous prejudicial remarks by defendant's counsel constitute reversible error?

4. Whether the trial court committed reversible error in denying certain requests to charge by appellant?

5. Whether the bias and prejudice manifested by the trial court against appellant and counsel deprived appellant of a fair trial?

STATEMENT OF THE CASE

Appellant, Giuseppe Catanzaro, a seaman, appeals from a judgment entered against him after trial by jury in the United States District Court for the Southern District of New York (Lévet, J.), on February 10, 1976, dismissing his complaint against defendant CENTRAL GULF STEAMSHIP CORP. for personal injuries under the Jones Act.

STATEMENT OF FACTS

Appellant has been a seaman (rating-ordinary seaman) for many years, first starting to sail in 1944 during World War II (28). His last employment was in 1970 aboard the S.S. Green Forest, owned and operated by defendant Central Gulf Steamship Corp. At that time his approximate wage was $13 per day.

His final ill-fated voyage commenced late in September 1970 when the Green Forest departed from California laden with ammunition for American combat soldiers in Vietnam.

The ship reached its destination, Port of Cam Ranh Bay in Vietnam, on October 25th when it docked at Pier 5.

On October 31st at 12:35 P.M. the ship completed its task of unloading (470) 2,094 tons of ammunition at Pier 5 (488). Although the job was done the ship remained at dock. At the same time another ammunition carrier, the S.S. ROBIN GREY, was docked at the same pier (377).

Thereafter at approximately 2:40 P.M. two incoming rockets landed on a road about 2 1/2 miles away from the pier

according to an entry in the log book of the Port Transportation Command (391-393). As a result it appears that the command termed this to be an emergency due to enemy attack (382). However, there is no independent testimony in the trial record establishing that these two rockets were fired by the enemy or from hostile sources. Nor is there evidence of any other enemy action against the Green Forest or in the vicinity thereof.

In any event the Harbor Master instructed John Waddell, a harbor pilot, to get the ammunition cargo ships out of the Port because of an attack (366). Accordingly, Waddell boarded the Green Forest and told the ship captain to get under way and out of the harbor (366-367). Although he was giving orders from the bridge (372, 394) the captain still was in command of the ship, including the unmooring, and Waddell was there "strictly as an advisor" (402).

At the same time a tugboat was dispatched to Pier 5 to assist the Green Forest with the unberthing (496).

Meanwhile Catanzaro was off duty, asleep in his bunk at 3:00 P.M. (48) when he was awakened by the chiefmate and told to get on deck to help undock the ship (115-116). He rushed out to the bow and was ordered by the second mate (Mr. Friend) to take in the starboard mooring lines to that the ship could leave the dock (36, 49). Friend was the officer in charge of the seamen who were taking in the lines at the bow (453, 470).

When Catanzaro came on the scene Moses Jackson (a

fellow seaman) was taking in the starboard lines (50) and shortly thereafter all lines were in except the springline which is the last line to be removed because it acts to spring the ship away from the pier (51, 374). Jackson & Catanzaro were the only ones working on the springline.

The far end of the springline was tied to the pier (103, 461) and the near end to a bitt on the fore-deck (121). In order to take this line in the near end was taken off the bitt and turned on the drum attached to the windlass (104, 121). Jackson turned the springline on the drum and made three turns (121) at which time the windlass was operating and the line was being taken in (122). However, he was ordered to put two more turns of line on the drum by Friend thus making five turns in all (123, 485).

As the drum rotated the springline was being taken in and Jackson while standing behind the drum was taking the line from the drum (104). Catanzaro was standing behind Jackson and taking the incoming line from him thereby coiling it on the deck (105).

While the springline was thus being hauled in and coiled, the free end (called the eye) was down in the water (461) being dragged through the water from the pier toward the ship. However, when the tugboat arrived to assist the Green Forest the springline was dragged across the bow of the tug (499).

The forward-most part of the bow is equipped with a king post called a cruciform bitt. Unhappily as the springline

was dragged across the bow of the tug, the eye of the line got caught on and was snared by this king post (499, 505). When the eye was snagged by the post there "was a sudden strain" (501) observed and felt by the tugboat captain who actually saw the springline stuck there and declared that was a dangerous situation (505).

When the eye-end of the springline got caught on the tugboat, there was an instantaneous reaction on the windlass-drum at the other end of the line. The free movement of the line onto the drum stopped, it started to smoke and it resisted the drum (182-183, 195, 208-209) and it tightened up (207). It became extremely taut (466).

At the same time the loose end of the line (the tail) being taken off by Jackson and coiled by Catanzaro "whipped backwards and forwards" with a violent "backlash" (181). This caused the line to fly out of their hands (207) and whipped them both (208). The line hit Jackson on the head and knocked him against the winch drum (182) while Catanzaro was hit in the leg and thrown in the air; he literally "flew up in the air and turned over a couple of times and then landed on his back." (180).

Immediately thereafter the eye-end of the line went slack and became disengaged from the tugboat (501). Jackson was not seriously hurt and continued with the job of hauling in the springline (215) but Catanzaro was severely injured and had to be moved (215, 468).

The jury returned a special verdict in favor of the defendant finding that Catanzaro did not prove that the defendant shipowner was negligent in the conduct of the unmooring operation and also did not prove that the Green Forest was unseaworthy.

POINT I

THE TRIAL COURT'S DEROGATORY COMMENTS PERTAINING TO APPELLANT'S EXPERT WITNESS CREATED PREJUDICIAL ERROR

The issues of negligence and unseaworthiness at the trial below were of paramount concern to plaintiff's suit for substantial damages.

In this connection he presented Angelos Chris Boulalas a master mariner with impressive credentials who spent ten years at sea of which nine years were as master of oceangoing vessels, and who now is a marine surveyor and maritime arbitrator (223-224).

The expert witness gave the following opinions:

1. It was bad seamanship not to have an operator in charge of the windlass (267).

2. It was bad seamanship not to have an officer observe the eye of the springline at all times while it was being hauled through the water (268).

3. It was bad seamanship not to give an order to stop the windlass motor at the time of the accident (268).

4. An unmooring party of three men was insufficient (270).

5. Failure to warn unmooring party that tugboat was in vicinity was bad seamanship (271).

6. Failure to warn unmooring party that no one was operating windlass was bad seamanship (271-272).

7. The order of the second mate to put five turns of the springline around the drum under the conditions described was bad seamanship (276).

The court below right from the start began to erode the status of Captain Boulalas by utilizing sarcasm as follows in criticizing his testimony (225):

"I didn't understand it then. It wasn't clear. The question now is has this witness, this proposed expert, read the testimony."

Then again as follows (227):

"Well, go ahead, will you, do something so we can get on with this case."

Then the court unfiarly seeks to impede the testimony by inviting opposing counsel to object (228):

"Is there no objection to this, Mr. Healey?"

Then the following unfair characterization of an exhibit (228):

"Exhibit 6 is in evidence, whatever it is. All right, what else, counsel?"

"Exhibit what?" (228)

"Reports of what? (228)"

"Well, that is meaningless." (228)

"Exhibit what?" (229)

Again the court openly invited opposing counsel to object (232):

"Not that one. All right. This will have to be sustained then, the objection, if it is made."

However, without embarrassment counsel refused the invitation by answering as follows (232):

"Not yet, your Honor."

Again another invitation to counsel (234):

"Now, is there any objection to his expertise, gentlemen?"

Again directing a caustic comment as to the questioning (234):

"Yes. Sustained. I don't know what dangerous conditions are."

When the witness testified to a war experience in Argentina (235) the court testaly inquired (236):

"What war was that?"

Returning to invitations to object (249):

"Wait. That will never do. There is bound to be an objection."

Again on the same page (249):

'That is what I just said not to do, and counsel, do you object to that, sir?"

"Oh, no." (250)

"That is out of order." (250)

And now at the bottom of page 250 the court seeks to indicate that Boulalas was selling his testimony as follows:

"You're paying for him. Or, your client is."

Then counsel is embarrassed with the following question from the court (251):

"Do you want to withdraw this witness now, sir."

Then the court actually made the following comment to counsel in front of the jury (251):

"... That is out of order and naturally there will be an objection. I am merely saying what some of those stumbling blocks are before you, but,

I don't seem to get much help about it from you."

In the same vein (253):

"All right, go ahead with your question if you can."

When counsel sought to question his expert witness about the behavior of Second Mate Friend, the court stopped him with the following unfair, prejudicial statement (261):

"He didn't do anything at all."

And two lines later:

"There is no proof that he did anything. He was there."

And now in an attempt to harry counsel at page 262:

"Well, it's taking a lot of time, but go ahead. See if you can't reduce it to a simpler question."

When counsel speaks about five turns around the winch, the court interrupts and says (262):

"The drum of the winch."

When counsel heeds the court and corrects his statement to drums of the winch the court comes right back with the following erroneous interruption (262):

"I don't know whether that it is shown whether there was any order that he put four or five turns ...."

And to Boulalis the court ungraciously snaps as follows (263):

"Now wait, Mister, until he finishes the question. Don't pop up yet. Finish your question, won't you counselor."

When Boulalis sincerely stated he could not answer a

question with one word, the court chided him as follows (265):

> "Well, take two words, or however many you think are necessary without making a long speech."

Again the court belittles the stature of the expert witness by the following (265):

> "Yes, the objection is sustained. Counselor, how can you expect to take the testimony of an expert if he himself can't boil it down to answering a question which you yourself posed?"

Again the following salutation by the court (266):

> "Wait a minute now. Wait a minute, Mr. Expert."

And this time (280):

> "All right. Just calm down. Counsel has a right to cross-examine you, and you are not -"

On redirect examination of Boulalas plaintiff's counsel he had a couple more questions. The court then seriously directed as follows (303):

> "All right. Two questions, that's what a couple means."

The court then prejudicially took upon itself the task of forcing counsel to admit that the unmooring experience took place under circumstances which were not normal as follows (303):

> "You don't call these normal, do you?"

When counsel answered no, "I said abnormal", the court followed up with (303):

> "Oh, abnormal. All right. Now, what is your question?"

The question of normal as against abnormal was a

question for the jury and the court's treatment of same, as indicated, was prejudicial error.

At the bottom of page 303 the court concludes with the following:

> "Now, your second question, because you had one."
>
> Then as follows (312):
>
> "I will stay here another 15 minutes, but then I'm going to adjourn for the day. I'm not going to go on with this kind of a fallacy."

Later in the absence of the jury the court made the following indiscrete remark pertaining to Boulalas (319):

> "... with respect to the testimony of the Greek so-called expert ..."

Although, this remark was not made in the presence of the jury, it still manifests the bias and hostility of the trial court to Boulalas as a person and also as an expert witness.

It is somewhat perplexing to recognize that the trial court repeated these prejudicial remarks in a more severe manner to the jury during the court's charge just before jury deliberation when it was most susceptible to influence by a learned court.

At the bottom of page 607 and top of 608 the court charged the jury as follows:

> "Then the plaintiff produced one Angelos Chris Ballolous, apparently a Greek, as a so-called expert. He has been a master mariner, as he testified, he mentioned his grades. He is presently a marine surveyor and maritime arbitrator, I think he said,

and a maritime arbitrator as I understand it would be called upon to determine the value or the damage sometimes when there are two ships which collide. You heard his qualifications."

This charge was a blatant but effective attempt to destroy the status of Boulalas and thereby also plaintiff's case. This ploy appears to have been successful since the jury brought in a verdict against Cantanzaro.

Referring to Boulalas as "apparently a Greek" was an insensitive, officious ethnic slur pandering to the lowest instincts of the jurors. Furthermore, calling him a "so-called expert" was an official sanction from the "awesome" might of the judiciary practically certifying that Boulalas was no expert at all. This characterization coming from and with the authority of the court had to have a baleful, prejudicial effect upon the minds of the jurors.

Furthermore, the Court's unwarranted, irrelevant remark that Boulalas is now only an arbitrator who is called upon to adjust collision claims is a nefarious invitation to the jury to disregard his expertise in this case. It is direct sabotage of plaintiff's case. It should not be countenanced by this court. The only proper reaction is a reversal of the judgment below.

Although the judge in a federal trial has great latitude in his remarks to the jury, there still is a standard for judicial restraint.

The judge should be cautious and circumspect in his

in his language and conduct before the jury. See Travelers Ins. Co. v. Ryan, 416 F.2d 362, and Myers v. George, 271 F.2d 168.

He should say or do nothing which will prejudice the rights of a party. See Butler v. United States, 317 F.2d 249, cert. den. 375 U.S. 836, 838, and Ward v. Booth, 197 F.2d 963. He should also refrain from any remarks calculated to influence the minds of the jury. Quercia v. United States, 289 U.S. 466, 470, and Starr v. United States, 153 U.S. 614.

Even if counsel fails to make objection to these prejudicial remarks the appellate tribunal will reverse if the errors are obvious and seriously affect the fairness of the trial. See United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 239, and United States v. Atkinson, 297 U.S. 157.

Since the comments herein surely created prejudicial error, the judgment should be reversed and a new trial granted.

POINT II

THE TRIAL COURT'S REFUSAL TO PERMIT PLAINTIFF TO ENGAGE NEW COUNSEL WAS A PREJUDICIAL, ABUSE OF DISCRETION

On the second day of trial plaintiff was 45 minutes late for court (56). As a result he was interrogated rather sharply by the trial judge in chambers (56-59). Plaintiff was warned that a recurrence would result in his paying "some money to the court and to these lawyers" or that his "case is going to be dismissed." (59)

Plaintiff then advised the court that he dismissed his lawyer and wanted to hire a new attorney (59). The court

refused to allow plaintiff to do that and told Catanzaro he must continue with his attorney (60). However, the court acceded to opposing counsel's suggestion that the matter be placed on the record (61).

Plaintiff wanted to discharge his attorney because they had an "argument" and the lawyer "flared up and shouted at him", and that he generally lost confidence in his attorney. (62-65)

Although the court was concerned about plaintiff's complaints (70) it denied his application. However, the court said it would permit him to change attorneys only upon the condition that he pay the sum of $2,500 to defendant's attorneys and additional sums to the U.S. attorney (74).

Since plaintiff is an indigent seaman he could not make these payments and was compelled to continue with an unwanted attorney.

Although appellant recognizes that his application was a discretionary matter, it is respectfully submitted that the denial of same and the imposition of oppressive monetary conditions were abuses of judicial discretion sufficient to warrant reversible prejudicial error.

The right to counsel is a highly regarded concept. Where a client loses confidence in his attorney, he should not be compelled to continue the attorney-client relationships. See Deauville Corp. v. Garden Suburbs G & C Club, 60 F.Supp. 72.

POINT III

THE CONTINUOUS PREJUDICIAL REMARKS BY DEFENDANT'S COUNSEL THROUGHOUT THE TRIAL CONSTITUTE REVERSIBLE ERROR

Defendant's counsel, Thomas Healey, in his zeal to "win" his case made continuous prejudicial remarks throughout the trial. It is respectfully submitted that such conduct constituted reversible error.

This pattern began with his opening statement to the jury (11-21).

His entire opening statement actually was an improper summation which normally follows at the close of the trial.

He started by telling the jury the case was an enemy armed attack whereby the Viet Cong were dropping rockets on plaintiff's ship (12). This was his testimony and was not established at the trial.

He also exhorted that enemy rockets were being directed at the Green Forest (12). Again only his word and no proof. However, he does tell the jury that he knows that from official army records (13). This, too, was not so and was only said to give authenticity to his "speech". He further compounds his vivid testimony by stating falsely that the crew members were sitting on the Green Forest and <u>seeing</u> the enemy forces attempting to blow up their ship. Those guys were going to get killed he says (13). They also see people shooting at them. He delivers a wild, unsubstantiated claim that "these guys had

14 minutes to get out of there (13). Again not true.

He paints a bleak picture of plaintiff in the opening statement by telling the jury that Catanzaro fought to get the job on the Green Forest because of the extra pay (15). He told the jury Catanzaro was "hungry for the money." (16) He castigates Catanzaro for being a grubby volunteer who now wants to "sue". (16) Because of this he says give the defendant "a fair shake". (21) He doesn't mention that Catanzaro's base pay is $13 a day (30).

Counsel continued this behavior throughout the trial right into his closing summation to the jury.

He tells the jury as a legal argument that Catanzaro "pocketed" his $200 bonus (549) which was "big bonus money." (551). He calls Catanzaro a "sunshine sailor" and a "weekend patriot" (551).

Counsel prejudiced and poisoned the emotions of the jurors who declaimed that Catanzaro "has a very favorable pay scale" and is "a lot better off than the soldiers who have come back with a bullet in them and no big bonus." (555) The lawyer also has the union upstaging the army by insisting "on big bonus money" and fancy "shore privileges" (555-556).

By now Healey has warmed himself to his vicious, prejudicial zealous endeavors and tells the jury "Catanzaro who's having trouble with the line" needed McCoy's help (564). Healey plants another evil seed by saying "Catanzaro wasn't doing his job right." (564)

The ultimate damage was when the court denied plaintiff's objection and said "the jury will determine what the proof was." (565)

Healey even falsifies the trial record when he blandly tells the jury that Catanzaro wasn't even coiling the line (565). Healey won't let go then says Catanzaro "was getting himself fouled in the lines and needed help." (568) He tells the jury to "look at his conduct" and implies that Catanzaro was doing "a terrible thing." (568) Then with an ugly charitable spirit he piously says to the jury well lets excuse Catanzaro because "he too was under pressure." (568)

Although counsel has certain discretionary liberties in arguing his cause, he cannot engage in prejudicial, inflammatory tactics abhorent to the other party. See Marron v. Atlantic Refining Co., 176 F.2d 313; Palmer v. Miller, 145 F. 2d 926, and Twachtman v. Connelly, 106 F.2d 501.

The judgment should be reversed because of counsel's conduct.

POINT IV

THE TRIAL COURT COMMITTED ERROR IN DENYING PLAINTIFF'S REQUESTS TO CHARGE

Plaintiff's requests to charge are fully set forth in the appendix at pages 21a-26a.

There are 13 separate requests numbered from 1 to 13. Requests numbered 2, 3, 4, 8, 9, 12 and 13 were refused by the court below.

It is respectfully submitted that the court was in error and that all refused charges should have been granted.

Each request is set forth in full in the appendix with appropriate legal citation. Accordingly, this court is respectfully referred to the appendix for consideration of such requests and the legal citations contained therein for the consideration and determination of this point.

POINT V

THE TRIAL COURT MANIFESTED PREJUDICIAL BIAS AGAINST APPELLANT AND HIS COUNSEL THROUGHOUT THE TRIAL

In addition to the conduct claimed in Point I of this brief it is respectfully urged that other prejudicial conduct of the trial court merits consideration herein for reversal of the judgment against plaintiff.

Throughout the trial the court favored defendant over appellant and his counsel.

Right at the start during opening statements to the jury, the court hurled what at first appeared to be a routine admonition. The said to appellant's counsel as follows (4):

"Please you let your voice fall."

The court then showed its first petulant disfavor by remarking as follows at the end of said opening statement (11):

> "All right, that was a pretty long summation, counsel."

Like comments continued on pages 34, 37, 38, 44, 54, 92, 97, 109 and 136 and then throughout the trial record.

The court continuously invited defense counsel to object to questions when no objections were first advanced.

This pattern continued right through final summations to the jury.

While the court began the trial with the admonition for plaintiff's counsel to keep his voice up (4) it concluded by telling counsel as follows (576):

> "You don't need to raise your voice, counsel."

At this point when counsel mentioned the earlier admonition, the court retorted as follows (576):

> "Don't lower it."

The court continually broke into counsel's argument to the jury as follows (577):

> "This is hardly rebuttal, counselor."

Again as follows (538-539):

> "Listen, there is no proof about that at all, counselor. That is pure speculation. Disregard it, members of the jury."

Once more (541):

"Well, there is no evidence about that. You are constantly getting into speculation. Please stop it. Disregard these speculative statements."

On the same page:

". . . No more remarks like that, counselor, please."

At one point counsel sought to quote a "famous saying" from a case when the court broke in as follows (542):

"No, don't quote cases at all, counsel. This is a matter of law. It is irrelevant here. This case depends upon the facts as shown."

When counsel then merely said "danger compels precaution as Justice Holmes said," the court spoke as follows (543) to the jury:

"Disregard that, members of the jury. The court will charge you on the law."

When counsel tried to explain that was only a speech, the court answered (543):

"Well, it is law. It is out of some Supreme Court Justice."

At the end the court actually belittled plaintiff's case as follows (545):

"Yes, it is the only day for the defendant, too, so get on with this, please. Come to a conclusion."

It is respectfully submitted that the court exceeded all proper comment and a new trial should be granted. See the cases cited in Point I of this brief.

CONCLUSION

THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE REVERSED AND A NEW TRIAL GRANTED

Respectfully submitted,

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STANLEY SHAPIRO
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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

Marc Bogatin, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 ~~Richmond Avenue, Staten Island, N.Y. 10302~~ Hendricks Sayville, N.Y. 11782. That on the 27 day of May 197 6 deponent served the within Appellant's Brief ~~and Appendix~~ upon:

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~~in this action, at~~

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Marc Bogatin

Sworn to before me, this 27
day of May, 197 6

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977